UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, Plaintiff, v. DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 14-11759-ADB

OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND ORDER COMPELLING USAO TO SEARCH FOR AND PRODUCE RECORDS

Defendant, the Department of Justice ("DOJ"), opposes Plaintiff American Civil Liberties Union Foundation of Massachusetts' ("ACLU") Motion for Summary Judgment and Order Compelling USAO to Search for and Produce Records [Doc. 56].

The ACLU's entire motion and supporting memorandum is based on a faulty premise – that the U.S. Attorney's Office is an "agency" within the meaning of the Freedom of Information Act ("FOIA"). It is not. The U.S. Attorney's Office is a component of an agency, namely, the DOJ. As such, the U.S. Attorney's Office is not the proper defendant, and the ACLU's entire argument is inapposite.

Inexplicably, the ACLU ignored the government's substitution – filed more than one year ago – of the DOJ as the proper party Defendant in this case and reverted to the original caption, which named U.S. Attorney Carmen Ortiz and the Federal Bureau of Investigation ("FBI") as Defendants. The motion for summary judgment against the U.S. Attorney should be denied for two reasons: (1) only agencies, not individual employees, such as the U.S. Attorney, are proper defendants in a FOIA case; (2) since the DOJ is the sole proper Defendant in this case, the DOJ

is best positioned to determine which of its components may have records responsive to the ACLU's FOIA request. The DOJ determined that the FBI is best suited to search for records responsive to Requests A (regarding the structure of the Massachusetts Joint Terrorism Task Force ("JTTF")) and B (regarding FBI Boston Field Office investigations); therefore, the DOJ is not obligated to search for records maintained by the U.S. Attorney's Office.

FACTUAL AND PROCEDURAL BACKGROUND

On December 9, 2013, the ACLU sent a letter to U.S. Attorney Carmen Ortiz seeking three categories of records under the FOIA. Doc. 1 at Ex. A. The ACLU sent a letter on the same date to the FBI seeking identical records under the FOIA. Doc. 1 at Ex. B. The ACLU sought records regarding: (A) the structure of the Massachusetts JTTF; (B) FBI Boston Field Office investigations; and (C) Massachusetts JTTF involvement with Ibragim Todashev. A copy of the ACLU's December 9, 2013 letter to the U.S. Attorney is attached to the Declaration of AUSA Jennifer A. Serafyn as Exhibit A ("Serafyn Decl."). Requests A and B are the only requests at issue for purposes of summary judgment.

The ACLU filed its Complaint on April 10, 2014. Doc. 1. The Complaint named the FBI and U.S. Attorney Carmen Ortiz as Defendants. Id. On June 5, 2014, the government filed a Notice of Substitution, substituting the DOJ for the two named Defendants. Doc. 17.

By early August 2014, the FBI completed its search for records responsive to each of the three categories of documents the ACLU sought. Doc. 29 at ¶ 1. The FBI submitted its first interim response to the ACLU on August 28, 2014. Doc. 30 at ¶ 1. Additional releases were made approximately every 60 days, with the final release of records on March 3, 2015. Doc. 53 at ¶ 16. In total, the FBI processed approximately 1,849 pages and released approximately 1,300 pages to the ACLU. Doc. 53 at ¶ 4.

On September 25, 2014, the DOJ told the ACLU that the U.S. Attorney's Office did not intend to search for documents responsive to Requests A and B.[1] Doc. 34 at ¶ 3. On several occasions, counsel for both parties discussed, by phone and email, the DOJ's position that the U.S. Attorney's Office would not search for documents responsive to Requests A and B; only the FBI would search for those documents because any documents the U.S. Attorney's Office had likely were duplicative of the FBI's documents. In anticipation of summary judgment and in a good faith effort to allay the ACLU's concerns about the DOJ's reasons for not searching for documents within the U.S. Attorney's Office, the DOJ sent the Declaration of James B. Farmer to the ACLU on May 19, 2015. See Serafyn Decl., Ex. B. The Farmer Declaration addressed the reasons why the U.S. Attorney's Office did not intend to search for documents regarding Requests A and B.[2] This declaration was not filed with the Court and was sent to the ACLU as a courtesy.

On August 25, 2015, the ACLU filed two separate motions for summary judgment: (1) a motion for summary judgment against U.S. Attorney Carmen Ortiz [Doc. 56] and (2) a cross-motion for summary judgment against the Federal Bureau of Investigation ("FBI").[3] [Doc. 60].

[1] The U.S. Attorney's Office continues to search for documents related to Request C, and is reviewing and releasing records on a rolling basis.

[2] The ACLU points to a Joint Motion for Relief from the Scheduling Order [Doc. 25 at ¶ 4] as evidence that the U.S. Attorney's Office at some point agreed to search for documents responsive to Requests A and B. This is inaccurate. First, this joint motion was drafted by the ACLU and sent to the U.S. Attorney's Office for review in the very early stages of this case. Second, paragraph 4 refers to emails. The parties contemplated and discussed a search for emails as to Request C only. Accordingly, paragraph 4 reflects the fact that the parties were still working out, both internally and together, the scope of the search based on the ACLU's request.

[3] Simultaneously with this filing, the DOJ is filing a separate opposition to the ACLU's cross-motion for summary judgment against the FBI.

ARGUMENT

I. The DOJ is the Sole Defendant in this Case.

The ACLU duplicitously ignores the fact that the DOJ is the sole Defendant in this case. On June 5, 2014, the government filed a Notice of Substitution, substituting the DOJ for the two originally named Defendants, the FBI and Carmen Ortiz, United States Attorney for the District of Massachusetts. [Doc. 17]. That substitution has never been challenged. Indeed, since the Notice of Substitution, numerous pleadings have been filed – including several by the ACLU – that list the DOJ as the sole Defendant. See, e.g., Doc. 34, 35, 37, 38, 45, 48. Now, over one year later, the ACLU inexplicably ignores the substitution and reverts to the original caption in its opposition to the FBI's motion for summary judgment, its cross-motion for summary judgment as to the FBI, and its motion for summary judgment as to the USAO. [Docs. 56 and 60]. The ACLU claims – for the first time – that the government "purportedly" substituted the DOJ [Doc. 57 at 3, n.2], and refers to the "attempted" substitution [Doc. 57 at 9], as if to suggest substitution was not actually accomplished. Substitution was accomplished. The ACLU did not challenge the substitution for well over a year and, in fact, accepted and adopted the substitution both in phone calls with the government's counsel and through filings in this case.

II. Individual Federal Employees, such as U.S. Attorney Carmen Ortiz, are not Proper Defendants in a FOIA Suit.

Even if this Court were to invalidate the never-challenged substitution and allow U.S. Attorney Carmen Ortiz to remain as a named Defendant, as an individual federal employee, she is not a proper Defendant in this FOIA case and must be dismissed. The law is clear that only federal agencies are proper party defendants in FOIA litigation. 5 U.S.C. § 552(f)(1); Earle v. Holder, No. 11-5280, 2012 WL 1450574, at *1 (D.C. Cir. Apr. 19, 2012) (per curiam) (affirming district court's dismissal of claims against District of Columbia employees); Godaire v.

Napolitano, No. 10-1266, 2010 U.S. Dist. LEXIS 122237, at *1-3 (D. Conn. Nov. 17, 2010) (dismissing plaintiff's FOIA claims against individuals, state entities, and private businesses because "FOIA applies only to federal agencies"). Consequently, neither the agency head nor any other federal employees are proper defendants to a FOIA suit. See, e.g., Drake v. Obama, 664 F.3d 774, 786 (9th Cir. 2011) (affirming district court's dismissal of FOIA claims against defendants because "they are all individuals, not agencies"); Cooper v. Stewart, No. 11-5061, 2011 WL 6758484, at *1 (D.C. Cir. Dec. 15, 2011) (per curiam) (affirming district court's dismissal of "claims against individual defendants because the [FOIA] only authorizes suits against certain executive branch 'agencies' not individuals"); Martinez v. BOP, 444 F.3d 620, 624 (D.C. Cir. 2006) (affirming district court's decision to dismiss FOIA claims against individual federal employees); Thompson v. Walbran, 990 F.2d 403, 405 (8th Cir. 1993) (per curiam) (dismissing suit brought against prosecutor, because plaintiff "sued the wrong party"); Petrus v. Bowen, 833 F.2d 581, 582 (5th Cir. 1987) ("Neither the Freedom of Information Act nor the Privacy Act creates a cause of action for a suit against an individual employee of a federal agency."); Sanders v. Obama, 729 F. Supp. 2d 148, 151 n.1 (D.D.C. 2010) (dismissing President Obama and two federal employees as defendants to action since "FOIA only provides for a cause of action based on the actions/inactions of agencies, not individuals"); Brown v. DOJ, No. 08-821, 2010 U.S. Dist. LEXIS 89351, at *6 (D.D.C. Aug. 30, 2010) (granting motion to dismiss claims against component office of DOJ and federal employees).

The ACLU improperly named an individual federal employee, U.S. Attorney Ortiz, as a Defendant in this case. Recognizing that, the government could have moved to dismiss the U.S. Attorney from the case. Instead, in a show of good faith, because the ACLU filed two identical FOIA requests with the FBI and the U.S. Attorney's Office, the government opted to substitute the DOJ for both the U.S. Attorney and the FBI. The ACLU has not to this point sought to

challenge the government's substitution. In any event, such a challenge would be futile because a case cannot be brought against the U.S. Attorney under the FOIA.[4]

III. The DOJ, the Sole Defendant, can and did Determine which of its Components is the Best Suited to Search for Responsive Documents.

The ACLU's motion for summary judgment against U.S. Attorney Ortiz relies on the faulty premise that the U.S. Attorney's Office is an "agency" subject to the FOIA. It is not. The "agency" in this case is the DOJ; the U.S. Attorney's Office and the FBI are components of that agency and, as components, are not proper defendants. Accordingly, the entirety of the ACLU's argument is unavailing.

As a general rule in FOIA cases, an "agency" must undertake a search that is "reasonably calculated to uncover all relevant documents." Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983). An agency's search is adequate if its methods are reasonably calculated to locate records responsive to a FOIA request. See Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). An agency need not search every records system so long as it conducts "a reasonable search tailored to the nature of a particular request." Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 28 (D.C. Cir. 1998). Indeed, "the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir.

[4] If the Court dismisses U.S. Attorney Ortiz, then the DOJ still would be the sole proper Defendant. The FBI is not a proper defendant in a FOIA case because it is not an "agency" as defined by the FOIA. 5 U.S.C. § 552(f)(1). Rather it is a component of an agency, namely the DOJ. Adionser v. DOJ, 811 F. Supp. 2d 284, 290 (D.D.C. 2011) (dismissing FBI as a defendant because "Components of federal agencies are not covered by FOIA . . . Because EOUSA, FBI, DEA, and BOP are components of DOJ, and it is DOJ that is an agency covered by FOIA, DOJ is the proper defendant in this case."); Blackwell v. FBI, 680 F. Supp. 2d 79, 86 n.1 (D.D.C. 2010) (citing 5 U.S.C. § 552(f)(1)) ("Because the FBI is a component of the Department of Justice and it is the DOJ that is an agency covered by FOIA, DOJ is the proper party defendant in this case."); Kidder v. FBI, 517 F. Supp. 2d 17, 19 (D.D.C. 2007) ("The Court concludes that the DOJ is the proper party defendant, and that the FBI therefore should be dismissed as a party.").

2003) (internal citation omitted); see Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 28 (D.D.C. 2003).

The ACLU appears to have a fundamental misunderstanding of the structure of the JTTF, how it operates, and the U.S. Attorney's Office's relationship to the JTTF. The FBI oversees and runs the JTTF, which is comprised of federal, state, and local law enforcement officers who have been specially designated to work with the FBI in the investigation and prosecution of counterterrorism matters. During the time that those officers are on the JTTF, they are co-located with FBI agents in FBI office space, and they work closely together. Serafyn Decl., Ex. B. For these reasons, the DOJ determined that, for Requests A and B, a search of the FBI is an adequate search of the DOJ's files.

Indeed, the FBI already has produced to the ACLU the documents that it seeks. For example, on or about October 30, 2014, the FBI released a document titled "Joint Terrorism Task Force, Standard Memorandum of Understanding Between the Federal Bureau of Investigation and (the "Participating Agency")." Serafyn Decl., Ex. C.[5] This document is the template for the Memorandum of Understanding ("MOU") that the FBI enters into with various state and local entities. Section IX.A. of the MOU provides that "**All JTTF materials and investigative records**, including any Memorandum of Understanding, **originate with, belong to, and will be maintained by the FBI.**" Id. at 8, § IX.A (emphasis added). The MOU further provides:

[5] In addition to this template MOU, the FBI released numerous MOUs that it entered into with various federal, state, and local entities, including: City of Boston Police Department [MASS JTTF 1096]; New Hampshire State Police [MASS JTTF 1080]; Massachusetts Bay Transit Authority Police Department [MASS JTTF 1113]; City of Providence Police Department [MASS JTTF 1130]; Rhode Island State Police [MASS JTTF 1146]; Bristol County Sheriff's Office {MASS JTTF 1170]; University of Massachusetts Amherst Police Department [MASS JTTF 1212]; Burlington (MA) Police [MASS JTTF 1231]; City of Portland Police Department [MASS JTTF 794]; Cranston Police Department [MASS JTTF 810]; Nashua (NH) Police Department [MASS JTTF 844]; and the Department of Defense [MASS JTTF 862].

> FBI policy for the NJTTF and JTTFs is to provide a vehicle to facilitate sharing FBI information with the intelligence and law enforcement communities to protect the United States against threats to our national security . . .
>
> This Memorandum of Understanding (MOU) shall serve to establish the parameters for the detail of employees (Detailees or members) from the Participating Agency to the FBI-led JTTFs in selected locations around the United States.
>
> The MOU specifically represents the agreement between the FBI and the Participating Agency, which will govern the process by which employees of the Participating Agency are detailed to work with the FBI as part of the JTTF.
>
> [T]he FBI formed JTTFs composed of other federal, state, local, and tribal law enforcement agencies acting in support of the above listed statutory and regulatory provisions.
>
> [T]he policy and program management of the JTTF is the responsibility of FBI Headquarters (FBIHQ). The overall commander of each individual JTTF will be the Special Agent in Charge (SAC) or Assistant Director in Charge (ADIC).
>
> Operational activities will be supervised by FBI JTTF Supervisors.
>
> All investigations opened and conducted by the JTTF must be conducted in conformance with FBI policy.
>
> JTTF members are subject to removal from the JTTF by the FBI . . .
>
> The FBI maintains oversight and review responsibility of the JTTFs.
>
> The FBI will provide office space for all JTTF members and support staff.
>
> The Participating Agency agrees to not knowingly act unilaterally on any matter affecting the JTTF without first coordinating with the FBI.

Serafyn Decl., Ex. C. The above language – taken from a document that the FBI produced to the ACLU months ago – supports the statements made in the Farmer Declaration. It is undisputed that the FBI oversees and runs the JTTF, and the documents the ACLU seeks in Requests A and B would have originated with the FBI.

Even though the U.S. Attorney's Office may have documents responsive to these requests, the DOJ believes these documents are duplicates of the FBI's documents. The Farmer Declaration supports this position: "I believe that any responsive documents that would be found in our office would have been originated by or received from the FBI and, therefore, would be duplicative of documents the FBI has and has searched for in response to the identical FOIA request that the ACLU of Massachusetts submitted to the FBI on December 9, 2013." Serafyn Decl., Ex. B.

Further, the ACLU's requests scarcely mention the U.S. Attorney's Office. Request A contains seven subparts; only one of those subparts mentions the U.S. Attorney's Office. Request A.1. seeks "Records indicating the Massachusetts JTTF's purpose and organization, its membership and command structure, and its relationship with the Federal Bureau of Investigation and the U.S. Attorney's Office for the District of Massachusetts." The remaining subparts seek documents that have little, if anything, to do with the U.S. Attorney's Office. For example, the ACLU seeks documents:

- indicating the number of FBI personnel assigned to the Massachusetts JTTF;
- identifying each federal, state, and local agency other than the FBI that participates in the Massachusetts JTTF;
- describing the structure of or protocols for information sharing between the Massachusetts JTTF and the Boston Regional Intelligence Center, the Commonwealth Fusion Center, the Massachusetts Bay Transportation Authority, or the Massachusetts Department of Transportation; and
- showing the budget of the Massachusetts JTTF.

None of the above information is of the kind that would have originated with the U.S. Attorney's office. The U.S. Attorney's Office does not assign FBI agents to the JTTF. If the U.S. Attorney's Office has any documents regarding the assignment of FBI personnel to the JTTF, it would be in the form of a document that originated at the FBI and was sent to the U.S.

Attorney's Office. Therefore, a search for these same documents at the U.S. Attorney's Office would, at best, yield a copy of the very same document that the FBI already released.

Request B contains two subparts and does not mention the U.S. Attorney's Office at all. Request B.1. seeks "[a]ll documents showing how many assessments, preliminary investigations, and full investigations the FBI Boston Field Office has conducted since 2011 . . . ." Obviously, the FBI is in the best position to know the number of assessments and investigations it has conducted. Again, any documents that the U.S. Attorney's Office might have regarding this request are documents that it would have received from the FBI. Request B.2. seeks documents showing "the number of FBI investigations that are open . . . ." Once again, the FBI is in the best position to know how many open investigations it has.

Moreover, James Farmer, who has been a DOJ attorney since 1985 and has served as the Chief of the Anti-Terrorism and National Security Unit of the U.S. Attorney's Office since 2005, states that he is not aware of any records in the Office that are responsive to the ACLU's Requests A and B and not duplicative of the FBI's documents. Serafyn Decl., Ex. B. This attestation should be enough for the Court to conclude that a further search of the U.S. Attorney's Office's files in unnecessary.

The ACLU cannot dictate which DOJ component searches for records responsive to its requests. See Batton v. Evers, 598 F.3d 169, 176 (5th Cir. 2010) (affirming district court's determination that search of locations most likely to hold responsive records was reasonable because "the issue is not whether other documents may exist, but rather whether the search for undisclosed documents was adequate") (quoting In re Wade, 969 F.2d 241, 249 n. 11 (7th Cir. 1992))); Knight v. NASA, No. 04-2054, 2006 WL 3780901, at *5 (E.D. Cal. Dec. 21, 2006) (stating that "there is no requirement that an agency search all possible sources in response to a

FOIA request when it believes all responsive documents are likely to be located in one place"). The DOJ conducted a reasonable and adequate search for records responsive to Requests A and B, and incorporates and relies upon its Motion for Summary Judgment as to the FBI, and supporting documents, which address this issue in detail. [Doc. 51-53].

IV. A Search of the U.S. Attorney's Office's Files is an Unreasonably Burdensome Fishing Expedition.

The ACLU claims that the DOJ has not established that a search for records within the U.S. Attorney's Office would be unreasonably burdensome. Doc. 57 at 8. This Court need not reach the issue of burden because the DOJ has determined that the FBI is the most appropriate component to search and has shown that the FBI search was reasonably calculated to find responsive records about the workings of the JTTF and the FBI Boston Field Office.

The FOIA does not require agencies to conduct unreasonably burdensome searches for records. Van Strum v. EPA, Nos. 91-35404, 91-35577, 1992 WL 197660, at *1 (9th Cir. 1992) (accepting agency justification denying or seeking clarification of overly broad requests because agency not required to conduct search which would place inordinate burden on agency resources); Ancient Coin Collectors Guild v. U.S. Dep't of State, 866 F. Supp. 2d 28, 33 (D.D.C. Jun 11, 2012) (finding that "although other archival and backup systems do exist, attempting additional searches would not only be unlikely to result in additional responsive material, but would also be costly and inconvenient"); Schrecker v. DOJ, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) (finding "that to require an agency to hand search through millions of documents is not reasonable and therefore not necessary," as agency already had searched "the most likely place responsive documents would be located"), aff'd, 349 F.3d 657 (D.C. Cir. 2003).

A search of the U.S. Attorney's Office's files for documents responsive to Requests A and B is unreasonably burdensome. Such a search likely would yield documents that are

duplicative of documents the FBI already produced to the ACLU. A search for potentially responsive documents "would necessarily have to involve an extensive manual search of paper files located in a total of four buildings at all three of the Office's locations – Boston, Worcester, and Springfield." Serafyn Decl., Ex. B at 2. It is unlikely that any of these documents would be in electronic form, so the files in each of these four locations would have to be searched manually. Id. If the Court reaches the issue of burden, the DOJ respectfully requests an opportunity to submit a supplemental declaration and briefing as to this issue to explain in detail the burdensomeness of such an extensive search.

CONCLUSION

For the foregoing reasons, the ACLU's Motion for Summary Judgment and Order Compelling USAO to Search for and Produce Records [Doc. 56] should be denied.

Respectfully submitted,

Defendant
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Dated: October 9, 2015

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants by First Class Mail.

/s/ Jennifer A. Serafyn
Jennifer A. Serafyn
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Dated: October 9, 2015